Comments Regarding National Compliance Initiatives
Proposed by the US Environmental Protection Agency on
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The Environmental Integrity Project (EIP) appreciates this opportunity to comment on the Environmental Protection Agency's proposed National Compliance Initiatives for Fiscal Years 2020-2023 (84 Fed. Reg. 2848, Feb. 8, 2019). EIP is a nonprofit public interest organization established in 2002 to promote more effective enforcement of federal environmental laws. We advocate for improvements to enforcement policy and practice and fewer loopholes and more accurate monitoring in regulations and permits. EIP also compiles, analyzes, and publicizes environmental data and compliance records, and helps to protect communities from illegal pollution through the strategic use of citizen suits.

EPA Should Not Shift Resources Away From Enforcement

EPA uses the term "compliance" rather than "enforcement" to characterize the proposed initiatives to emphasize use of the "full range of compliance assurance tools" to "increase the environmental law compliance rate and reduce the average time from violation identification to correction." As the February 6 proposal recognizes, EPA has long relied on an appropriate mix of strategies to encourage voluntary compliance while holding polluters accountable for violations of environmental law. But given budget cuts that have reduced enforcement staff by 15% over the past five years, the Agency cannot afford to shift resources away from the civil and criminal prosecutions of serious violations to boost spending on compliance assistance.

There are already too many cases where the deliberate dumping of chemicals into the air or water or onto the land is ignored, even *after* government agencies have been tipped off by citizens or the polluters' own employees. We have separately provided the Office of Enforcement and Compliance Assurance with a list of twenty nine of the many complaints called into the National Response Center in 2018, and have provided the names of the facilities at which these incidents supposedly occurred based on the address or location information available in the NRC database. The reported incidents include the dumping of ammonium phosphate, sulfur, isopropyl alcohol and other contaminants into storm drains or waterways; the release of vinyl chloride and toxic solvents into the air and water by a large auto plant; workers sent to the hospital by the illegal burning of methanol; attempts to "burn off" lead and chromium, and the blowing of lead dust through fans.

These allegations may not be supported by sufficient evidence in every case but are surely worth investigating. If EPA is unable to respond to the most flagrant violations, any claims that compliance rates have improved are less likely to be taken seriously by the general public.

EPA Enforcement Actions Need to be More Timely Once Serious Violations Are Discovered

EPA's goals include correcting violations as soon as possible after discovery, which is a critical objective. That should include a commitment to move quickly to enforce when EPA finds evidence of serious noncompliance, and recovering penalties (or imposing sanctions in criminal cases) that are high enough to make companies pay a fair price for ignoring environmental laws. EIP has provided OECA with examples of cases still awaiting action long after serious violations have been identified through inspection reports, notices of violation, or publicly available monitoring records. For example:

1. On March 17, 2017, EPA investigators gave Denka Performance Elastomers a detailed report documenting, "many thousands of instances where monitored pollutants or parameters failed to meet limits" meant to control emissions of chloroprene, dioxins, or other pollutants. EPA monitors show that airborne levels of chloroprene, a potent carcinogen, remain far above levels the Agency considers "acceptable" in neighborhoods nearest the plant in Lake Charles, Louisiana. Nearly 1,600 people live within a mile of this facility in historically African American neighborhoods, more than two thirds in households with incomes below the poverty level. This case has been pending for nearly two years.

2. On November 5, 2015, EPA issued a Notice of Violation to Gopher Resources in Egan, Minnesota, alleging that the lead battery recycler failed to comply with pollution control limits designed to minimize emissions of lead, dioxins, and other pollutants. Nearly 4,000 citizens live within a mile of the plant, more than 200 of whom are children five years of age or younger, and the area downwind is not yet in compliance with health-based air quality standards for lead. This case has been pending for three years and four months.

3. On June 30, 2015, EPA issued a Notice of Violation (NOV) to Globe Metallurgical for modifying an electric arc furnace and increasing sulfur dioxide emissions in 2013, and for hundreds of violations of pollution control requirements that are supposed to limit releases of lead, arsenic, and other hazardous air pollutants. According to EPA's ECHO data base, more than a thousand people live within 3 miles of the plant, nearly half of those in households with incomes below the poverty level. The case has been pending for more three years and eight months.

We understand there may be some activity in several of these cases, such as the vaguely defined, "voluntary" cleanup that Louisiana's Department of Environmental Quality "ordered" Denka to perform after EPA found chloroprene levels in nearby communities that after three years of monitoring are still too high. These are not a substitute for the kind of enforcement that is needed in these cases, given the egregious violations documented by EPA's own staff years ago.

Penalties Should Make It More Expensive to Violate the Law than to Comply on Time

Where EPA does bring an enforcement action, the penalties need to be demonstrate that it costs more to violate the law than to comply on time. EPA's February 6 proposal recognizes that:

> "Leaking equipment and improperly operated flares remain some of the largest sources of HAP emissions from petroleum refineries and chemical manufacturing facilities. Improper operation of an industrial flare can result in hundreds of tons of excess HAP emissions. Improperly operated flares remain some of the largest sources of HAP emissions from petroleum refineries and chemical manufacturing facilities." 40 Fed. Reg. 2848 at 2849 (Feb. 6, 2019).

Yet the Phillips 66 Wood River refinery in Illinois paid only $475,000 under a consent decree lodged in August of 2018 to resolve claims – documented in notices of violation EPA issued in 2014 – that its flare did not meet the minimum combustion efficiency required for more than 2,500 days. The penalty amounts to less than $200 for each day these standards were violated, despite the enormous volume of pollution released by these defective flares. EPA has targeted these kinds of flaring violations at petroleum refineries for nearly twenty years, so a multi-national corporation like Phillips should have had little excuse for so many violations.

Similarly, Akzo Nobel paid only $35,000 under a February, 2017 administrative penalty order to settle charges that the flares at its facility in Morris, Illinois, failed to meet minimum heat values needed to destroy organic pollutants for nearly 12,000 hours between 2011 and 2014. Akzo Nobel's fine amounted to $70 for each of the nearly 500 days these violations occurred. The penalties in these two examples – more than two orders of magnitude below the maximum amounts authorized by the Clean Air Act – are too low to deter other would-be violators from waiting until the EPA enforcement program catches up to them.

EPA Audit Incentives Should Apply to Noncompliance that is Voluntarily Disclosed and Corrected, not to Violations Discovered by EPA

These incentives for self-policing – which include reducing or eliminating penalties for noncompliance that companies voluntarily disclose and correct -- work well when regulated sources understand waiting until EPA finds their violations will be more costly. In the 2008 fiscal year, for example, EPA reported that 538 companies had agreed to audit and correct violations at 2,298 facilities while enforcement actions against other violators recovered $127 million in penalties and nearly $12 billion in cleanup costs. In other words, EPA does *not* need to shift resources away from enforcement to motivate companies to voluntarily comply with the law, and doing so is more likely to discourage such efforts in the long run.

Until now, EPA's audit policy was meant to give companies an incentive to find, fix, and disclose violations that had not already been identified by the Agency. in several recent actions, the Agency has gone further by waiving penalties for companies that agree to "audit" and correct violations uncovered by EPA's own investigators.[1] For example, EPA flyovers on May 8 to 16, 2018, used Optical Gas Imaging Technology to identify unburned hydrocarbons released from unlit flares at oil and gas extraction sites and a compressor in the Eagle-Ford Shale area of Karnes County, Texas. These violations are significant as unlit flares vent all of the organic pollutants in waste gas directly to the atmosphere, rather than destroying 98 to 99% through combustion.

All of the violations identified through the May, 2018 EPA flyovers were resolved through administrative orders that require companies to audit and correct these violations, with no penalties assessed. EPA's compliance incentive programs should encourage companies to discover and correct their violations *before* they are found by EPA. Why should companies spend money to voluntarily comply with environmental rules if there are no penalties for doing so only *after* their violations are discovered by EPA?

[1] The administrative orders cited as examples do preserve EPA's ability to collect penalties for the violations in question, but it seems highly unlikely that EPA will ever exercise these rights.

EPA went a step further in an agreement covering multiple oil and gas extraction facilities in the Eagle-Ford Shale region that were acquired by Devon Energy in 2014. On May 28, 2015, Devon notified the Texas Commission on Environmental Quality that it had corrected all violations the company identified through a comprehensive audit of its new acquisitions (Texas law shields companies for violations that are self-corrected through auditing). Six months later, EPA flyovers "identified significant hydrocarbon emissions from storage tanks and unlit flares" at some of the same sites that Devon had certified were in compliance in its May 28 letter to TCEQ.

EPA agreed on February of 2018 to let Devon conduct another round of auditing and correction, without paying any penalty for having told TCEQ that these problems had already been fixed. The Agency's action in this case rewards companies who shield new acquisitions from enforcement the first time around by reassuring state agencies that all violations have been found and corrected even when that later proves to be untrue. EPA should explain how the public interest is served by letting violators off the hook under these circumstances.

EPA Should Reconsider Decision to Stop Targeting Key Sectors for Compliance and Enforcement Initiatives

We encourage EPA to reconsider its decision to stop targeting key sectors when setting priorities for compliance assistance, investigations or enforcement. The February 6 proposal acknowledges the value of EPA's specialized enforcement expertise, but does not recognize that comes from working to better understand compliance problems that arise within specific industries. Many of the most important environmental regulations are expressly designed for certain sectors, e.g., petroleum refineries or steel mini-mills, and EPA enforcement is more effective when Agency staff are able to develop a thorough understanding of the industrial processes subject to these regulations. The resulting expertise can be applied on a national scale to improve compliance at multiple facilities and ensure that competitors within the same industry can count on a level playing field. This approach also distinguishes EPA's enforcement work from that done by individual states, which face obvious limits on their jurisdiction.

Previously, EPA has targeted key sectors where noncompliance is serious and persistent enough to threaten air or water quality or public health. EPA's new approach would, for example, remove "oil and gas extraction" as priority and focus instead on "significant sources of volatile organic compounds (VOC's) that have an impact on air quality" or vulnerable populations. But the National Emissions Inventory indicates that the oil and gas sector accounted for 3.2 million out of the 3.9 million tons of VOC's emitted in 2014 from all industrial sources, and that share has likely increased as oil and gas output has broken all previous records since that year.

Enforcement of Clean Air Act Hazardous Air Pollutant Rules Will Be Undermined by Rollbacks and Weaker Monitoring

We support EPA's continued focus on cutting hazardous air pollutants to support EPA's broader strategic goal of protecting vulnerable populations and improving air quality in areas that fail to meet Clean Air Act health based standards. Achieving these goals will require EPA to improve monitoring of hazardous air pollutants, reduce the amount of time it takes to initiate and resolve enforcement actions, and recover higher penalties that make it more expensive to violate the law than to stay in compliance.

Clean Air Act rules control hazardous air pollutants (HAP's) for specific industrial categories (e.g., electric arc furnaces) based on a combination of emission limits, operating parameters, and work practices. These standards rarely include actual numerical limits for specific HAP's, such as lead or benzene. Instead, HAP's are controlled through "surrogate" limits on other pollutants, such as particulate matter or benzene, or by requiring sources to maintain certain parameters to assure that air pollution control devices are capturing and removing HAP's at the desired rate (e.g., 95%). For example, particulate matter emission (PM) limits may be adopted to control metals like lead or arsenic, which adhere to particulates. Because PM emissions are usually measured though short-term stack tests once every several years, the rules may also require sources to monitor baghouses to make sure they are not leaking particulates to the atmosphere before they can be removed by fabric filters.

This complex web of operating limits and parameters was adopted in part because regulated industries argued, not without reason, that the direct measurement of specific HAP emissions would be expensive or impossible. But recent EPA actions may substantially eliminate these monitoring requirements for many large plants, making it much harder to determine whether HAP limits have been violated or vulnerable communities put at risk.

For example, EPA's repeal of the "once in, always in" policy in January of 2018 allows facilities currently regulated as major HAP sources to be reclassified as "minor sources," by representing that their actual emissions have fallen below the thresholds initially used to identify facilities subject to the more stringent standards that apply to major sources.[2] But the decision also make it harder to develop the evidence that EPA needs to evaluate compliance or bring enforcement action in two ways:

- A major source that qualifies for the exemption may be subject to "area source standards" that, in most cases, are far less stringent and require much less monitoring. For some industry categories, EPA has not developed any standards at all for sources that are not classified as major.

- Even where current monitoring systems remain in place, it will be very hard for EPA enforcement to know whether the HAP emissions are low enough to qualify a major source for the new exemption. As discussed above, EPA's standards do not require the actual measurement of HAP emissions, but rely on surrogates and operating parameters. The enforcement program will need to develop new methods to quantify the HAP emissions that result from exceeding emission limits for surrogates like particulate matter or carbon monoxide, or failing to meet parameters for baghouse pressure, scrubber water flow levels, minimum furnace temperatures, or other operating conditions.

OECA cannot muster the "full range of compliance assurance tools" to cut hazardous air pollutants and protect vulnerable populations if it cannot secure reliable monitoring requirements in the rules it is expected to enforce. The Agency should closely examine the impact that proposed rollbacks will have on EPA's ability to measure compliance, and explain what alternative methods EPA will use to quantify hazardous air pollutants or ensure that facility emissions are not jeopardizing vulnerable populations.

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[2] We have explained in a separate letter to EPA's Office of Air and Radiation how this change will increase HAP emissions, by allowing major sources reclassified as "minor" to turn off pollution control equipment or operate it much less frequently.

EPA Needs to Be More Transparent About When Violations Are Identified and Enforcement Actions

The EPA's Enforcement and Compliance History Online (ECHO) is the public's primary source of data for, well, a facility's enforcement and compliance history. Unfortunately, the ECHO database makes it almost impossible to determine whether an EPA Clean Air Act enforcement action has been timely and a violator is back in compliance.

If EPA wants to improve compliance rates and speed the enforcement process – both worthwhile goals – it needs to present reliable and consistent data about the compliance status of specific facilities, and to be clear about when either EPA or a state agency first identified violations and whether those have been resolved through a consent decree or compliance order. ECHO does not currently provide such data for EPA's own Clean Air Act cases. For example:

- On June 30, 2015, EPA issued a Notice of Violation (NOV) to Globe Metallurgical for multiple violations of federal hazardous air pollutant (HAP) rules. ECHO's "Three Year Compliance History" indicates that EPA "addressed" these high priority violations in the second quarter of 2016, but indicates 'no violations identified" in the succeeding months. This suggests that the high priority violations identified earlier by EPA have ended, although under EPA's own policies they are presumed to continue until the enforcement action is concluded.

- On March 17, 2017, EPA's National Enforcement Investigations Center (NEIC) gave Denka Performance Elastomers an inspection report detailing 'many thousands of instances" where the plant failed to comply with HAP limits. The ECHO database does not identify this plant as a high priority violator all, although it clearly is based on NEIC's own inspection reports.

We hope EPA will reconcile these discrepancies and demystify the process of trying to determine which violations are a high priority and when such cases have been resolved. Thank you again for the opportunity to comment.